Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

YAHYA LAVI,
Petitioner,

vs.

WILLIAM DUNCAN, Warden
California Men's Colony,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a federal habeas corpus action filed by a State prisoner, the Suspension Clause is violated by dismissal on the basis of the one-year statute of limitations, 28 USC §2244(d)(1), when the petitioner has diligently pursued his state and federal remedies but has never been afforded a hearing by any court and both the District Court and Court of Appeals have denied certificates of appealability.

Parties to the Proceeding

All parties are listed in the caption of the case.

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STATEMENT OF JURISDICTION

Certiorari is sought to review the Order entered November 2, 1999,by the United States Court of Appeals for the Ninth Circuit which denies Petitioner's request for a certificate of appealability pursuant to 28 USC §2253(c). Rehearing was not sought.

Under 28 USC §1254(1), this Court has certiorari jurisdiction to review the denial of a certificate of appealability by a United States Court of Appeals. See, *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

This petition calls into question the constitutionality of the one-year statute of limitations set out in 28 USC §2254(d). Because 28 USC §2403(a) may apply, and pursuant to Supreme Court Rule 29.4(b), a copy of this petition has been served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001. The United States Court of Appeal did not certify to the Attorney General of the State of California that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, §9, Clause 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

28 USC §2244(d)(1):

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

STATEMENT OF THE CASE

Petitioner, YAHYA LAVI, a physician, is serving a sentence of 13 years in the California correctional system following his conviction of multiple sexual offenses against female patients.

On July 22, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in the Central District of California, which raised three fully exhausted constitutional claims.

1. Violation of the Sixth Amendment right of confrontation and the Fourteenth Amendment right to due process of law through limitation of cross-examination at trial.

2. Violation of the Fourteenth Amendment right to due process of law by the admission of evidence at trial of inflammatory and irrelevant evidence concerning Petitioner's character and prior bad acts which rendered the proceeding fundamentally unfair.

3. Cumulative prejudice from Claims 1 and 2 which rendered the proceedings fundamentally unfair, denying due process.

On September 18, 1997, Lavi amended his petition to add an additional claim of ineffective assistance of counsel which had been exhausted in the California Supreme Court on September 8, 1997. The amended petition expanded the claim of cumulative error to cumulate the prejudice from trial court errors and the ineffective assistance of counsel.

Upon motion of the Respondent, this first petition was dismissed without prejudice upon a finding that state remedies had not been exhausted with regard to the amended claim of cumulative prejudice. The district court reasoned that while each of the claims of trial court error and the claim of ineffective assistance of counsel were individually exhausted, the cumulative prejudice therefrom had not been specifically raised in the state court. In so doing, the district court rejected Lavi's argument that it would be futile to return to state court to argue cumulative prejudice from errors that the California courts had already determined had not occurred. This Order of March 6, 1998, specifically stated that the dismissal was "without prejudice to petitioner's right to file a new petition after he has exhausted state remedies."

Lavi returned to state court and exhausted the cumulative error claim. He then filed a second federal petition on October 9, 1998, which reiterated the three constitutional claims and cumulative error. Upon motion of the Respondent, the district court dismissed the petition with prejudice by Order entered April 8, 1999, on the ground that the second petition was not filed within the one-year statute of limitations, 28 USC §2244(d). The Court accepted the State's position that no tolling having occurred during the pendency of the first federal petition, the statute of limitations ran on December 4, 1997. It rejected Lavi's argument that the State was estopped from

reliance on the statute because it had silently acquiesced in the March 6, 1998, order which set out a right to return. Quite simply, the State had misled the petitioner and the Court by not indicating at that time that it was relying on the December 4, 1997, cutoff. Such an estoppel by acquiescence has been recognized in similar circumstances. See, *Burris v. Parke*, 95 F.3d 465 (7th Cir., *en banc* 1996).

Lavi sought to appeal this final order by requesting a certificate of appealability in the District Court. This was denied on May 24, 1999. His timely request to the Court of Appeals for a certificate of appealability was denied on November 2, 1999, although the Court did have jurisdiction to issue the certificate pursuant to 28 USC §§1291 and 2253(a).

At this point Lavi had done everything possible to bring his constitutional claims before the federal court, only to find himself mousetrapped by the Order of March 6, 1998, which had led him out of federal court while stating a right to return, a right which proved illusory. With the denials of the certificates of appealability, his claims have been denied solely on the basis of the statute of limitations and the merits have never been heard. Having exhausted all available procedures, he now relies on the Suspension Clause to supersede the statute of limitations because the remedy of habeas corpus has become inadequate and ineffective.

ARGUMENT

A statute of limitations for habeas corpus is a relatively new impediment to the Great Writ. 28 USC §2244(d) was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No.

104-132, 110 Stat. 1214. This Court has not yet determined the constitutionality of such a limitation under the Suspension Clause.

This Court has, however, said that the Suspension Clause is violated when an impediment renders the remedy of habeas corpus "inadequate and ineffective." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 1229-30, 51 L.Ed.2d 411 (1977). But it has also determined that not all impediments do so. For example, this Court has held that restrictions on filing successive petitions do not violate the Suspension Clause. *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996).

But *Felker v. Turpin* did not address impediments to a *first* federal habeas petition. Petitioner Lavi's situation fits that of a first filer as his "second" petition resulted directly from the district court's order instructing him to exhaust and return. Thus, the petitions are linked by the action of the Court and should be viewed singularly.

Of first petitions and the Suspension Clause, this Court has observed in *dicta* that,

> "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human delivery." *Lochnar v. Thomas*, 517 U.S. 314, 324, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1995) (emphasis in original).

Lochnar disapproved of the dismissal of a first federal habeas petition on equitable grounds other than those set

out in Rule 9 [Delayed or Successive Petitions] of the Rules Governing Section 2254 Cases.

The time has come to squarely hold that the one-year statute of limitations is an unconstitutional impediment to the Great Writ when applied to completely bar access to the federal courts. The statute is simply a ticking clock which, unlike Rule 9, does not take into consideration the matter of prejudice to the State. It is merely a statute of convenience for the states, and its purpose is to render the remedy of habeas corpus "inadequate and ineffective" for those who do not meet the 365-day limit regardless of the merits of their petitions.

As a consequence, the circuit courts have utilized the fiction of equitable estoppel to toll the statute in "extraordinary circumstances." See, *e.g.*, *Calderon v. United States (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), *cert.denied*, 118 S.Ct. 899,1389 (1998). This is simply a judicial way of avoiding the Suspension Clause question in difficult cases. Likewise, an "actual innocence" exception to the statute of limitations has been created. See, discussion in *United States v. Zuno-Arce*, 25 F.Supp. 1097 (C.D. Ca. 1998).

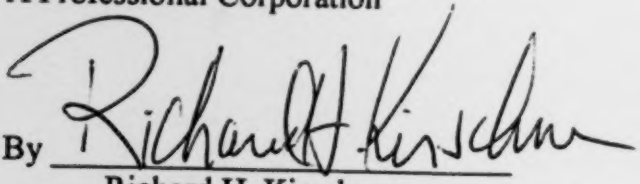
Although it may have been the intent of Congress to put all petitioners on an equal footing with the one-year limitation, current practice promotes disparity rather than uniformity. As evident from comparing the equitable position of petitioner Lavi to that of the petitioner in *Burris v. Parke, supra*, courts will view estoppels such as silent acquiescence differently. Further, the notion of "extraordinary circumstances" places an "extraordinary" burden on petitioners. They may lose their rights simply

because they do not know of them, *e.g.*, *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir.), *cert.denied*, 119 S.Ct. 210, 1442 L.Ed.2d 173 (1998), or lack the prison legal facilities to implement them, *United States v. Van Poyck*, 980 F.Supp. 1108, 1111 (C.D. Ca. 1997). Again, individual equities are weighed and uniformity is lost.

Petitioner therefore seeks a determination that the one-year statute of limitations on its face is an unconstitutional impediment which renders the writ of habeas corpus "inadequate and ineffective," *Felker v. Turpin, supra*, when applied to a first petition, *Lochnar v. Thomas, supra*, and a remand for determination whether or not his petition meets the requirements of Rule 9 of the Rules Governing Section 2254 Cases.

Respectfully submitted,

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